

## Summary and Explanation of Proposed Udall Amendment

“Posse comitatus” is a fundamental principle, dating back to our nation’s founding, that the federal military should not serve as a domestic police force. Congress enshrined that principle into law in 1878 through the “Posse Comitatus Act,” which prohibits federal troops from engaging in domestic law enforcement unless Congress has made a specific exception. Congress has before authorized exceptions for extraordinary circumstances such as insurrections or refusals by state governments to enforce civil rights laws.

The Posse Comitatus Act applies to National Guard units **BUT ONLY** when they are federalized under Title 10 of the U.S. Code. The Posse Comitatus Act does **not** apply when National Guard troops are acting in “hybrid” status under Title 32, serving a federal mission set by the President or Secretary of Defense while still under the operational command of the state governor. The activities the National Guard can undertake under Title 32 are supposed to be limited to drug interdiction, homeland defense activities, and training exercises. But on June 9, 2020, Attorney General William Barr wrote to DC Mayor Muriel Bowser stating that section 502 of Title 32, entitled “Required Drills and Field Exercises,” authorizes the President or the Secretary of Defense to assign any duty whatsoever to a state’s National Guard unit.

If the President continues to utilize the National Guard in the way suggested by Attorney General Barr, it is more important than ever to close the loophole in Title 32. The President should not be able to use title 32 to have a functional military, in the form of the National Guard, at his disposal domestically to activate whenever and however he wants. Such power is particularly dangerous because the National Guard can operate free from the limits of posse comitatus under Title 32, which means it can perform searches, seizures, arrests, detentions, and other activities the armed forces were never meant to perform in this country.

The Udall amendment closes this loophole by **preventing the National Guard from serving as a domestic police force when operating under the “Required Drills and Field Exercises” provision of Title 32**. The amendment **exempts disaster relief efforts** and would not change the National Guard’s authorities under other parts of Title 32, such as the ability of Guard units to conduct counter-drug and homeland defense activities. Nor would it affect any of the statutory exceptions to the Posse Comitatus Act, such as the Insurrection Act.

### Impact of Udall Amendment:

- **Protects the principle of “Posse Comitatus”.** This amendment prohibits National Guard members from undertaking “search, seizure, arrest or other similar activities” when those National Guard members are acting pursuant to 32 U.S.C. § 502 via an appropriations provision.
- **Closes a legal loophole.** Under 32 U.S.C. § 502, the President or Secretary of Defense can order National Guard units to perform “operations or missions” without federalizing the National Guard pursuant to Title 10 of the U.S. Code. Section 502 therefore creates a loophole allowing the President to have a military force at his disposal, without being subject to the Posse Comitatus Act and its prohibition against using federal troops for law enforcement purposes.
- **Protects state sovereignty.** According to Attorney General William Barr, the Secretary of Defense relied on 32 U.S.C. § 502 to deploy National Guard units from other states into D.C., despite the objections of D.C.’s Mayor. But while D.C. is a special case, A.G. Barr’s interpretation would apply to deployment in any state. If this interpretation is allowed to stand, any future President could deploy National Guard troops from one state into another state without the second state’s consent and without the safeguards of the Posse Comitatus Act.